LEGAL AND POLITICAL INTERNATIONAL QUESTIONS AND THE RECURRENCE OF WAR.

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A recourse to war in our day is such a terrible visitation not only for the belligerent nations but also in the long run through its indirect effects for all neutral powers as well, that humanity of late years has cried aloud more insistently perhaps than at any other period of history for some way of avoiding the scourge of war. Unfortunately as yet it is not generally appreciated that the real causes which produce war are deep-seated and not generally apparent on the surface, while the events which as a rule actually precipitate war are in themselves more or less of trifling importance.

Though we cannot see the elimination from the world of all war any more clearly than we can look for the complete eradication of consumption or cancer, nevertheless, international publicists are working to find a way to save the world from the woes inflicted by war with as stout hearts and as much hope of success as the surgeons, physicians, chemists and others who are working to guard humanity from bodily disease and ailment. And how international justice shall in all cases be substituted for war as arbiter between nations, is as difficult a problem calling for solution as any known to the human intelligence.

To-day I shall present for your consideration especially one point of this problem, to wit, that the causes of disagreement arising between the members of the family of nations seem to divide naturally into two great groups. Into one of these groups fall the cases which can be settled by invoking jural rules, while to the other group belong those problems which usually call for an appeal sooner or later to war. To the former of those two groups of cases belong all the cases of difference which, however they may be decided in favor of one contestant or the other do not really affect

the future political development and power in the world of either party to the cause of difference. To the latter group belong all the cases of difference upon whose solution depends the future political power and prestige in the world of one or more of the contesting nations.

As far back at least as the first suggestion of the Geneva Tribunal, discerning jurists and publicists had appreciated that the cases of disagreement which arose between nations naturally separated into these two groups of cases, the first of which is more strictly legal, and the second of which is more strictly political. And as more and more of the former class of cases, that is legal cases, were successfully referred for settlement to international tribunals named *ad hoc,* while at the same time cases of the second group, that is political cases, were referred to the arbitrament of war, the vital difference between these two classes of international cases became apparent to an ever-growing number of jurists. And the present war should make it clear to every one possessed of ordinary common sense, that as the social organism of the world is now constituted, there can be no hope of eliminating all wars. For where it becomes not a question of which of two nations or groups of nations is right, according to the rules and usages of the law between nations, but which of such contestants shall have the power to map out the political policy of a larger or smaller portion of the world in its own interest, a judicial court, even were a supreme court of the world in existence, could not decide which side was the stronger. All that a court of law can do is to decide which contestant is right according to the law. And between municipal and international tribunals there is this radical difference at present; that back of the former there is the whole police and military force of the state of which any given court is an organ to enforce the judgment of that court. While back of an international tribunal to-day there is only the public opinion of the world, and the military power of one of the contestants, or one group of contestants to any case to insure the acceptance of the decision. And if the last sanction is invoked it means a return to the original arbitrament of war.

To designate these two great classes of cases into which the questions of difference arising between nations naturally seem to

divide, the French publicists have used the terms *cas juridiques* and *cas politiques* to describe respectively the cases that are susceptible of a judicial solution and those which are not. In England, Westlake[1] and Oppenheim[2] have used the terms *legal* and *political* cases to designate respectively the cases which may be solved by an appeal to judicial procedure, and the cases which seem to lead sooner or later to war. Among American publicists Hershey[3] also has used the terms legal and political. Likewise in the proceedings of the two Hague Peace Conferences, the terms *juridique* and legal were used respectively in French and English.[4] Of late years pacifists in this country have applied to those two great divisions of international questions the terms *justiciable* and *non-justiciable*. These latter terms, however, are not so good as the terms legal and political used by the great British international publicists and commentators. For the word justiciable is distinguished from the word justifiable by a difference of only one letter, and as a consequence a confusion of the words is liable to arise in the popular prints. Also the expression non-justiciable is a negative term and consequently inferior for that reason to the expression political which is a positive term.

Following the nomenclature devised for the purpose by the great French and British international jurisconsults and commentators, I have applied to these two great categories of international questions, the terms *legal* and *political* cases respectively. And in an effort to differentiate between the cases which so far nations have been willing to refer to judicial settlement, that is legal cases, and those which nations have preferred to submit to the decision of war, that is political cases, the present writer ventured to advance at the close of 1913 the following definitions of legal and political cases in the affairs of nations.[5]

[1] Thomas Balch, "International Courts of Arbitration," 1874, 6th edition, Philadelphia, 1915, page 63.

[2] Lassa Oppenheim, "International Law," 2d edition, London, 1912, Volume II., page 1.

[3] Amos S. Hershey, "Essentials of International Public Law," New York, 1912, pages 323, 338.

[4] A. Pearce Higgins, "The Hague Peace Conferences," Cambridge at the University Press, 1909, pages 122–123.

[5] Thomas Willing Balch, "Différends juridiques et politiques dans les rapports des Nations: Revue Générale de Droit International Public," Paris, 1914. page 181.

In any investigation of how far judicial settlements have and can be successfully substituted for war in deciding the differences arising between nations, it is necessary to look far back in the history of our own period of civilization to examine the political changes which gradually led to the formation of what we now call nations, and also to scan carefully the attempts which have been made in the past to mitigate the severity and curtail the area of war.

When feudalism had developed and extended throughout Europe, the relations of man to man upon which feudalism was based resulted in a constant clashing of individuals over matters of more or less moment without, however, the existence of any restraining force to compel individuals to keep their quarrels within bounds so as not to cause detriment to the political life and well-being of other individuals who were not interested in the cause of discord. As a consequence, it was perfectly proper for one feudal lord who was at war with another feudal ruler but whose lands did not touch, indeed might even be far apart, according to the means of communication of the times, to march his retainers and men-at-arms across the lands of the intervening neighbors who had no cause of quarrel with either of the belligerent lords. The warring lords in so doing were merely making use of the public highways. Gradually there began to form, first in the west of Europe, by the grouping

"The expression, *legal cases,* should be recognized to mean questions arising between nations which, while a cause of dispute between two or more sovereign states, *do not* threaten by their solution in favor of one side or the other, the independence or any vital interest of either party. The expression, legal cases, furthermore, should be recognized to apply to all those cases which do not affect the vital interests of the contesting nations, whether there are or are not rules of the law of nations upon which the majority of the great powers of the world are agreed, ready at hand to apply to such cases in arriving at a judicial decision for their solution.

"The expression, *political cases,* should be recognized to mean questions arising between states which, owing to the facts and interests involved in those cases, *do* threaten, in any attempt to solve those questions by a judicial decision, in the future to affect and alter either favorably or unfavorably the political power and influence of one or more of the nations parties to the controversy. The expression, political cases, furthermore, should be recognized to apply to all those cases which do affect the vital interests of the contending nations; even though there may be rules of international law generally recognized by the nations the application of which to those cases would decide them strictly on legal grounds in favor of one side or the other."

of many fiefs, both small and large but speaking similar dialects or patois, round one overlord, generally called a king, a new kind of political organism. Based roughly upon a similarity of language there began to grow up slowly at the expense of feudalism the kingdoms of France, England, Spain, Sweden, Saxony, Brandenburg, and various other political bodies which were the ancestors of the modern European nations. In these newly forming political organisms, the relation of the overlord to his vassals and their subjects was not one that permitted an indirect allegiance of the subjects of his vassals to the overlord as was the case in purely feudal times. The Kings of France, of England,[6] of Scotland, of Sweden,

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CORRIGENDUM.

In Mr. Thomas Willing Balch's paper in the current volume of *The Proceedings of the American Philosophical Society* (Vol. LV for 1916) the two paragraphs in fine print at the bottom of page 270 have been misplaced, they should have been printed at the top of the page.

[Please tip in to face page 270]

[6] The feudal relation introduced in England by Duke William of Normandy marked an important step forward towards the development of the nations as they exist to-day. For William the Conqueror required from all feudal vassals of every degree in England an allegiance to himself as king. The difference in feudalism as thus established in England from the feudalism developed in France and elsewhere on the continent may best be shown by the difference in the French and the English feudal oaths which in substance were as follows:

THE FRENCH FEUDAL OATH.

On bended knee and with uncovered head I make myself thy man of life and limb and earthly honour.

THE ENGLISH FEUDAL OATH.

On bended knee and with uncovered head I make myself thy man of life and limb and earthly honour, saving my allegiance to my lord the King.

Thus on some islands in the river Seine in the northern part of modern France a settlement started which in time developed into the city of Paris. The islands were chosen as a place of settlement in the beginning because the water about them formed a natural boulevard against attack. A line of fighting men gained the local feudal lordship there; and in the course of time they extended their landed possessions to both banks of the river and then bit by bit in all directions. From one of their number, Hugh Capet, though he was not the first of his line to rule there, the family came to be known as the Capetians. Then, as time passed, the territorial domains of the Capetians and their Valois successors was extended still farther, sometimes by conquest in war, sometimes by marriage. It was by the marriage, for example, of three French kings, with two successive heiresses of Britanny where the Salic Law did not obtain, that the Celtic-speaking Duchy of Britanny was united to the French crown and so politically to France.[7] Slowly but surely, in spite of many checks caused by the English on the one side or the Burgundians on the other, the territorial power of the Capetians grew, until in time, they came to be looked on as kings of France and head of a growing state. More and more the Capetians and their Valois successors absorbed the sovereign power from the feudal barons, whether large or small, about them, until by the time of the peace of Westphalia, the French nation stood out as a clearly cut and fairly harmonious unit.

Within the Germanic Empire by an apparently reverse process the same result was attained. For within the Holy Roman Empire, which Voltaire aptly said was "neither Holy, Roman, nor an Empire," the great feudal vassals of the emperor, instead of having their feudal sovereign rights gradually curtailed and absorbed by merger in the sovereignty of their overlord, the emperor, as happened in France for instance, on the contrary were able to increase their own sovereign rights at the expense of the emperor, until he became a mere shadow which came to an end in 1806 as a result of Na-

[7] Charles the Eighth and Louis the Twelfth married in succession the Duchess Anne; and François de Valois, who became Francis the First of France, married Claude de France, Duchess of Brittany. The son of this last pair, Henry the Second, became both King of France and Duke of Brittany.

poleon's victorious career. The gradual crumbling away of the Germanic emperor's sovereignty was doubtless due to the fact that he was an elective and not a hereditary prince as was the case with the kings of France and England, for example. As a result within the Germanic Empire there grew up among the welter of small feudal princelings the powerful political units of Hanover, Saxony, Bavaria and Brandenburg, to name only the more important of the developing German states.

Whether in the west, or the center of Europe, however, the importance of relatively small potentates gradually vanished before the rise of the new order of political entities, such as France and England and Brandenburg. As a result, questions began to arise between these more powerful political organisms, while the questions growing out of the relations of individuals to one another fell more into the background with an ever-growing tendency to disappear.

For it was not to the interest of the king or elector or however the supreme overlord of the new order of political organisms might be called, to have their vassals, whether great or small, quarreling and fighting. A continual warfare among the vassals and subjects of the overlord meant an impairment of their sources of revenue and a corresponding loss of power and influence in dealing with their equals about them. And as a consequence the new supreme sovereigns sought by every means in their power to curb the carrying on of private war by their barons. As this war of individuals was gradually suppressed, until to-day in any well-administered state it does not prevail, war began, however, to occur between the newly developing states. As humanity in western and central Europe was delivered gradually of the curse of private war by the growth of the institution of the kingly power, as personified in the royal courts backed up by the police power of the king, there grew up, however, in place of the disappearing strife between individuals, war between the newly forming nations. The rising power of the kings and their like had rescued the European peoples from the continual state of armed peace and war which thrived under the feudal regime. But with the rise of the new nations, for private war there was sub-

stituted war between the new order of sovereigns. Towards the end of the sixteenth century, Gentilis wrote in the "De jure belli": "*Bellum est publicorum armorum iusta contentio.*" Which may be rendered into English, as follows, "War is a just contention of the public force."[8] And from this same curse of war in a new form the peoples strove to find deliverance.

During the Middle Ages and indeed until fairly recent times, the authors of the various plans, often more or less fantastic, advanced to do away with war and maintain peace between the nations, aimed to accomplish their object by one stroke of statesmanship. Humanity did not realize that changes in the social structure of the peoples can only be accomplished slowly and with the passage of much historic time. While none of the plans to change the world at once into an unarmed camp of peace succeeded, nevertheless, some minor points of difference arising between the new order of sovereigns that emerged from feudalism, as feudalism gradually gave way before nationalism, were referred for settlement to some kind or other form of arbitration. And when the young republic of the New World entered into the membership of the family of nations much impetus was given to the application of international arbitration as a way of settling international difficulties. Still wars occurred to devastate now this, now that land. The eagerness of humanity in the nineteenth century to rid itself of the curse of war and all its accompanying hardships and miseries was abundantly attested by the enthusiasm with which it greeted the official prominence given to mediation, as a means of reconciling rival nations, by the congress of the leading powers of Europe held at Paris in 1856. But as time passed, it was realized that mediation could not blot out war between nations. Then came the trial of the *Alabama* claims before the Geneva Tribunal in 1871–72. That epoch-marking event, coming just after a bitter and costly war between two of the leading powers of the world, gave new hope to a world that dreaded war and all its attending sufferings and evils.

[8] Alberici Gentilis, I. C. Professoris Regii, "De Ivre Belli, Libri III. Nunc primum in lucem editi. Ad illvstrissimvm Comitem Essexiæ, Hanoviæ, apud Hæredes Guilielmi Antonii MDCXII.," book one, chapter II., entitled, "Belli definito," page 17. The above reference is to the third edition. The first edition was published in London in 1598.

And when the Bering Sea Fur Seal case was carried in 1893 to an international court named *ad hoc* for judicial settlement, and that case was followed a few years afterward by the submission, thanks largely to President Cleveland, of the Venezula-British Guiana boundary to another international tribunal constituted likewise *ad hoc,* the hopes of humanity in the gradual abolition of war rose, and those hopes rose still higher with the assembling at the call of the Emperor Nicholas the Second of the First Hague Peace Conference asking for the limitation of armaments, although that was not a fruit of the labors of the conference.

The more that the subject of peace and war among nations is examined, in the light of past and present events, the more apparent it becomes that new forces must be developed to induce nations to be willing to submit their causes of difference which diplomatic means cannot solve to an international tribunal for solution. The great dread of the loss and suffering brought on by war is sufficient to induce nations in most cases where matters are involved that do not affect their power and strength in the world to agree with their rivals to submit such cases to some sort of international tribunals for decision. But the dread of war is not sufficient to cause nations to agree to seek a judicial solution concerning those questions which do affect the future place and power in the world of nations. In other words in cases of dispute involving the "place in the sun" of nations it is hopeless, where it is uncertain which side is the stronger, to hope for a submission of such cases to international tribunals. International tribunals in their relations to nations have not the compelling power behind them, as municipal courts have in their relations to individuals, to force nations to appear at their bar and abide by their judgments. In the present order of things in the world, nations only take cases to international tribunals which they are willing to submit to such courts; there is as yet no force devised to compel nations to appear before such tribunals as countless numbers of individuals are made to appear almost any day in the municipal courts.

In such questions of difference, as resulted in the Franco-Prussian War of 1870–71, the Russo-Turkish War of 1877–78, the

South African War of 1899–1902, the Russo-Japanese War of 1902–1905, and the present Great War, it would have been useless for any tribunal to have attempted to settle the controversy on the basis of jural rules. The underlying cause of trouble in each of those cases did not involve merely matters which would not affect the future political development and power of the contestants at the council board of the nations of Europe, no matter how the matters in dispute were decided. On the contrary, the cause of strife in each case was because each side wished to possess something which they could not both have, but upon the possession of which, according to the way the question of difference was solved, whether by arms or jural means, the future influence among the members of the family of nations of the rival contestants would be enhanced or lowered.

To build up some sort of international organism which will at all times maintain peace between nations will require much time and effort. Yet something already has been done towards the realization of that object. The machinery necessary to permit judicial settlements to replace wars has been developed. Doubtless it can be perfected still further. But that is not, however, the weak point in the effort, now many centuries old, to maintain peace and avoid the curse of war. The real difficulty is how to induce nations to submit all their differences to some sort or other of international tribunals. Consequently, in order to eliminate war between nations as much as possible, one of the important objects to aim at at present is not so much to try to perfect the judicial machinery for deciding disputes between nations, but rather to do away as much as possible with the things that produce war. In other words, to so change the status of certain relations between nations that the desire to resort to war in order to obtain something will be done away with.

One necessary step to this end of world peace, provided that it is an attainable thing, would be to remove from the world of what may be called some of the hardships that press on certain nations. So far as possible this should be done upon the principle of an equitable *quid pro quo*. An example of that sort of thing was the

world wide territorial rearrangement concluded in 1904 by France and Great Britain. By that arrangement each of those two powers gave up to the other some territory to rectify their frontiers or important privileges in exchange for something elsewhere of equivalent value. In that way the causes of possible clash in the future between them were reduced to a minimum.

In the same way, looking to the present and the future, the United States, for example, could arrange to give Canada one or two, possibly more franc ports along the Alaskan *lisière* in exchange for some other privilege, so that merchandise going into or out of the Dominion would be assured at all times of passage to or from Canada through the Alaskan *lisière* without any vexations or delays arising from our customs.

Or even the United States might give to Canada in exchange for the Island of Campobello, a narrow strip of land leading down to one of the fiords which advance into the *lisière* so that a Canadian railroad could be built to tide water with sufficient space upon the shore to allow a commercial port to be developed.

Another problem which calls in the interest of peace for a wise solution is the need of the great Russian Empire for a port which is never locked up with ice.

It has been suggested that a neutralization of the ocean trade routes of the world would make for the maintenance of peace among the nations. Then, of course, there naturally arises the question how shall that neutralization be maintained? In other words, if the nations agree to neutralize the ocean trade routes, how can that agreement be upheld in times of war?

A rearrangement or reconstruction of the *status quo* between individual nations, however, while helping to make more secure in given cases the peace of nations, would not of itself go very far in eliminating the desire for war between all nations. Something additional is necessary if any serious hope of securing world peace is to be looked for.

One solution of how to maintain peace in the world would be a return to the state of things which did actually occur in the latter part of the period of civilization immediately preceding our own civilization, when the Roman state gained dominion for a consider-

able period of historic time over practically the whole known world, and for that period of time extended the benefits of the *Pax Romana* to the many kinds of peoples living within the frontiers of the empire. The Roman law did much to bring peace to the world. But the *Pax Romana* was extended, it must not be forgotten, by force of arms and was maintained only so long as the Roman legions were able to uphold the power of the empire and prevent the barbarians of the outside unknown world from breaking through the Roman frontiers. And when that force of arms ultimately was no longer sufficient to restrain the rising tide of humanity outside of the empire, the Roman law was swept away with the fabric of the empire and in its place for several centuries chaos reigned.

The conquest of the world, however, by one power as a means of obtaining peace among the nations, is asking all nations, conqueror and conquered alike, to pay a high price. In our own period of civilization persistent efforts have been made to find some other way to do away with the arbitrament of war between nations. And the most generally talked of way in recent years of eradicating war from human affairs seems to be the formation of a world federation. The thought of the formation of a world state superimposed on the present members of the family of nations is not at all a new idea, though some of those who to-day are pressing it forward as the magic wand which will free a suffering world from the dread and cost of future war when the present conflagration has burnt itself out, seem in perfect good faith to believe that it is an idea developed in our own day and generation. That this is not so can be easily seen by any one who will look up what Henry Quatre and the Duc de Sully, Crucé, Penn, the Abbé Saint Pierre, Kant, Lorimer, and other publicists have said on that subject.

As far back as the year 1623, indeed, Émeric Crucé, a Frenchman, propounded in an embryonic form a league to enforce peace by assembling at Venice a congress of ambassadors to sit permanently with the mission of settling cases of difference between sovereigns and with the backing of the combined forces of all the powers represented.[9] This was really a forerunner of the movement to develop

[9] Thomas Willing Balch, "Le Nouveau Cynée de Émeric Crucé," Paris, 1623, Philadelphia, 1909, page 101, *et seq.*

an international force to insure peace among the nations which was launched last year here in Philadelphia in our old Pennsylvania State House, only a stone's throw across the square from this hall. That League to Enforce Peace was organized on June 16 and 17 last.[10] The most important object of the league in its purpose to form a league among the nations for the preservation of peace is described in a brief paragraph as follows:

"The signatory powers shall jointly use forthwith both their economic and military forces against any one of their number that goes to war, or commits acts of hostility, against another of the signatories before any question arising shall be submitted" either to an international judicial tribunal or to a council of conciliation.

The idea of the league embodied in the above resolution is not to form a league to make war in order to maintain the peace of nations upon a power not a member of the league, but merely to restrain a member of the league from attacking another member state without first having submitted legal cases of quarrel to an international court or political disputes to a council of mediation. That proposal is a first step, if it can be carried successfully into effect, towards the formation of either a World Federation, or at least a federation of a great part of the world. The difficulties in the way are enormous. Nevertheless, *C'est le premier pas qui coute,* the bishop told the King of Paris when the latter was thinking of adding by conquest to his domain the little town of Saint Denis a few miles to the north of Paris. Perhaps the step taken in the historic Colonial State House of Pennsylvania last June, may possibly be the first step towards the formation of a great international force that will uphold the peace of nations.

As upon the ending of the present Great War, a great deal will possibly be heard of substituting international justice for international war in settling the differences of nations, and indeed already much has been said on that subject in the Americas since the war began, it will be well not to forget the stern realities that the world must face in seeking to accomplish such a beneficient object.

A study of the history of the world, more especially since the

[10] "League to Enforce Peace," printed by the League to Enforce Peace, Fifth Avenue, New York, 1915.

conclusion of the peace of Westphalia and including the course of the present war, would seem to show that while it would be well to do everything possible to avoid war by a recourse to international courts in all possible cases, and much can be done to promote that laudable object, still it is well also to remember that the Creator has ordained our world in such a way that force of some kind, sooner or later, is at the back of all social evolution. You may hold back the laws of nature for a time and even in a way deflect them from their course, but ultimately those laws will prevail and one of those laws of nature is the law of force. And a great and important reason for not forgetting at the present time the realities that the world must face in the effort to do away with war as far as possible, is that just as the Thirty Year's War helped the passing away of feudalism before the incoming new era of nationalism, so it is possible that the Great War will mark a change no less important from nationalism to a new order of things in the world.

It may be said of the questions of disagreement which arise between the members of the family of nations, that, owing to the realization more and more each year by the peoples of the world of the benefits derived from the interplay of commercial interests between nations, as well as the appreciation that war to-day through its great destruction of wealth and life penalizes victors as well as conquerors, there has grown up an invisible, perhaps one might say an intangible force to induce nations to settle most of their legal differences by an appeal to international tribunals. For when international cases can be settled by an appeal to jural rules upon the basis of justice without hurting or endangering the future power in the world of a nation, the peoples have been contented to see their governments invoke international tribunals to decide between the nations. But as yet there has not developed a sufficient force of any sort to induce or compel nations to submit all their political differences to judicial settlement for solution. And so it leaves us face to face with a momentous problem: How will humanity devise a force sufficiently strong to cause nations to settle all their differences without an appeal to war, or in other words, how will the nations transform the present political cases into legal cases?